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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Beau John Greene,

9 Petitioner,

10 vs.

11 Charles L. Ryan, et al.,¹

12 Respondents.
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) No. CV-03-605-TUC-FRZ

) DEATH PENALTY CASE

) **MEMORANDUM OF DECISION**
) **AND ORDER**

14
15 Petitioner Beau John Greene, a state prisoner under sentence of death, has filed an
16 Amended Petition for Writ of Habeas Corpus. (Dkt. 82.)² Petitioner alleges, pursuant to 28
17 U.S.C. § 2254, that he is imprisoned and sentenced in violation of the United States
18 Constitution. In a previous order, the Court denied Petitioner's request for evidentiary
19 development and dismissed Claims 1, 2, 3, 4-A (in part), 4-C (in part), 5, 6-A, 6-B (in part),
20 6-C, 7-B, 8, and 12 based on a procedural bar; Claim 9 as not cognizable; Claims 7-A, 7-C,
21 and 10 on the merits as a matter of law; and Claim 11 without prejudice as premature. (Dkt.
22 86.) Two claims, one with several subclaims, remain. For the reasons set forth herein, the
23 Court finds that Petitioner is not entitled to habeas relief.

24 **BACKGROUND**

25 Petitioner was convicted and sentenced to death for the murder of Roy Johnson, a
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27 ¹ Charles L. Ryan, Interim Director of the Arizona Department of Corrections,
28 is substituted for his predecessor pursuant to Fed. R. Civ. P. 25(d)(1).

² "Dkt." refers to the documents in this Court's case file.

1 music professor at the University of Arizona in Tucson. The following recitation of the facts
2 surrounding the crime is based on the decision of the Arizona Supreme Court affirming
3 Petitioner's murder conviction and death sentence, *State v. Greene*, 192 Ariz. 431, 967 P.2d
4 106 (1998), and this Court's review of the record.

5 Roy Johnson was last seen around 9:30 p.m. on February 28, 1995, leaving a church
6 where he had just given an organ recital. Although his wife expected him home before 10:00
7 p.m., Johnson did not return. Four days later, authorities found his body lying face down in
8 a wash. Petitioner admitted at trial that he killed Johnson.

9 On the day of the murder, Petitioner's friends, Tom Bevan and Loriann Verner, told
10 Petitioner he could no longer stay in their trailer outside of Tucson. A drug dealer had
11 threatened to shoot Petitioner over an outstanding debt, and Bevan and Verner feared that
12 Petitioner's presence in their trailer would ruin their relationship with the dealer. Petitioner
13 stole a truck and drove to Tucson where the truck broke down. Sometime that night, during
14 Johnson's drive home from the concert, he and Petitioner crossed paths.

15 Petitioner testified that he had been using methamphetamine continuously for several
16 days and was suffering from withdrawal. He was resting in a park when Johnson stopped
17 his car and approached him. According to Petitioner, Johnson wanted to perform oral sex
18 on him and offered to pay for it. Petitioner accepted, and the two drove to a secluded parking
19 lot in Johnson's car. Petitioner testified that he changed his mind and told Johnson that he
20 would not follow through. In response, Johnson purportedly smiled and touched Petitioner's
21 leg. At that point, Petitioner "freaked out" and impulsively struck Johnson several times in
22 the head with his fist. He moved Johnson's body to the back of the car, drove to a wash, and
23 dumped the body. He walked back to the car and drove away. According to Petitioner, he
24 then realized he needed money so he returned to the wash, walked down to the body, and
25 stole Johnson's wallet.

26 The trial evidence undermined Petitioner's version of the killing. First, and most
27 significantly, medical testimony indicated that the damage to the victim's skull was inflicted
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1 by a heavy flat object, not, as Petitioner testified, by a fist. The bones of a fist striking a
2 person's head will shatter before the thick bones of the skull, and Petitioner's hands were not
3 injured. Second, only one set of tire tracks and footprints entered and left the wash where
4 the body was found, suggesting that Petitioner did not return for the wallet but had it with
5 him when he left immediately after the murder. Third, Petitioner told Bevan he beat
6 someone to death with a club.

7 After dumping the body, Petitioner drove Johnson's car directly to the Bevan/Verner
8 trailer, where he told Bevan about the killing. Petitioner asked Bevan for some clean shoes.
9 He also took a rug to cover the bloody car seats.

10 Petitioner left the trailer and headed for K-mart, the first of several stops he made on
11 a shopping spree using the victim's cash and credit cards. To explain the discrepancy
12 between his signature and those on the credit cards, Petitioner wrapped his hand with K-Y
13 jelly and gauze to simulate a burn injury. He bought clothes, food, camping gear, a scope
14 and air rifle, car cleaner, and a VCR, which he later traded for methamphetamine.³ He
15 eventually abandoned Johnson's car in the desert. Several days later, the police arrested
16 Petitioner at a friend's house.

17 The jury convicted Petitioner of kidnapping, robbery, and first-degree murder. Pima
18 County Superior Court Judge Bernardo P. Velasco sentenced Petitioner to death for the
19 murder and terms of imprisonment for the other counts.⁴ On direct appeal, the Arizona
20 Supreme Court reversed the kidnapping conviction but otherwise affirmed. *State v. Greene*,
21 192 Ariz. 431, 967 P.2d 106 (1998). A petition for certiorari to the United States Supreme
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23 ³ He also stopped at an adult bookstore where he purchased a sex toy. (RT
24 3/13/96 at 109-10, 182.)

25 ⁴ At the time of Petitioner's trial, Arizona law required trial judges to make all
26 factual findings relevant to capital punishment and to determine sentence. Following the
27 Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which held that a jury
28 must determine the existence of facts rendering a defendant eligible for capital punishment,
Arizona's sentencing scheme was amended to provide for jury determination of eligibility
factors, mitigating circumstances, and sentence.

1 Court was denied in May 1999. *Greene v. Arizona*, 526 U.S. 1120 (1999).

2 Petitioner filed a petition for post-conviction relief (PCR) pursuant to Rule 32 of the
3 Arizona Rules of Criminal Procedure on August 18, 2000, and an amended petition in
4 December 2001. Following an evidentiary hearing, the PCR court denied relief in January
5 2003.⁵ On December 4, 2003, the Arizona Supreme Court summarily denied a petition for
6 review. Thereafter, Petitioner initiated the instant habeas proceedings.

7 **APPLICABLE LAW**

8 Because it was filed after April 24, 1996, this case is governed by the Antiterrorism
9 and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). *Lindh v. Murphy*, 521
10 U.S. 320, 336 (1997); *see also Woodford v. Garceau*, 538 U.S. 202, 210 (2003).

11 For properly exhausted claims, the AEDPA established a “substantially higher
12 threshold for habeas relief” with the “acknowledged purpose of ‘reducing delays in the
13 execution of state and federal criminal sentences.’” *Schriro v. Landrigan*, 550 U.S. 465, 475
14 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA’s “‘highly
15 deferential standard for evaluating state-court rulings’ . . . demands that state-court decisions
16 be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per
17 curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

18 Under the AEDPA, a petitioner is not entitled to habeas relief on any claim
19 “adjudicated on the merits” by the state court unless that adjudication:

20 (1) resulted in a decision that was contrary to, or involved an unreasonable
21 application of, clearly established Federal law, as determined by the Supreme
Court of the United States; or

22 (2) resulted in a decision that was based on an unreasonable determination of
23 the facts in light of the evidence presented in the State court proceeding.

24 28 U.S.C. § 2254(d). The relevant state court decision is the last reasoned state decision

25 ⁵ During PCR proceedings in this matter, Judge Velasco left the Pima County
26 bench to assume a position as a United States Magistrate Judge for the District of Arizona.
27 Pima County Superior Court Judge Jane L. Eikleberry presided over the evidentiary hearing
28 and ruled on the PCR petition.

1 regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v.*
2 *Nunnemaker*, 501 U.S. 797, 803-04 (1991)).

3 “The threshold question under AEDPA is whether [a petitioner] seeks to apply a rule
4 of law that was clearly established at the time his state-court conviction became final.”
5 *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection
6 (d)(1), the Court must first identify the “clearly established Federal law,” if any, that governs
7 the sufficiency of the claims on habeas review. “Clearly established” federal law consists
8 of the holdings of the Supreme Court at the time the petitioner’s state court conviction
9 became final. *Williams*, 529 U.S. at 365; see *Carey v. Musladin*, 549 U.S. 70, 76 (2006).
10 Habeas relief cannot be granted if the Supreme Court has not “broken sufficient legal
11 ground” on a constitutional principle advanced by a petitioner, even if lower federal courts
12 have decided the issue. *Williams*, 529 U.S. at 381; see *Musladin*, 549 U.S. at 77.
13 Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be
14 “persuasive” in determining what law is clearly established and whether a state court applied
15 that law unreasonably. *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

16 The Supreme Court has provided guidance in applying each prong of § 2254(d)(1).
17 The Court has explained that a state court decision is “contrary to” the Supreme Court’s
18 clearly established precedents if the decision applies a rule that contradicts the governing law
19 set forth in those precedents, thereby reaching a conclusion opposite to that reached by the
20 Supreme Court on a matter of law, or if it confronts a set of facts that is materially
21 indistinguishable from a decision of the Supreme Court, but reaches a different result.
22 *Williams*, 529 U.S. at 405-06; see *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). In
23 characterizing the claims subject to analysis under the “contrary to” prong, the Court has
24 observed that “a run-of-the-mill state-court decision applying the correct legal rule to the
25 facts of the prisoner’s case would not fit comfortably within § 2254(d)(1)’s ‘contrary to’
26 clause.” *Williams*, 529 U.S. at 406.

27 Under the “unreasonable application” prong of § 2254(d)(1), a federal habeas court
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1 may grant relief where a state court “identifies the correct governing legal rule from [the
2 Supreme] Court’s cases but unreasonably applies it to the facts of the particular . . . case” or
3 “unreasonably extends a legal principle from [Supreme Court] precedent to a new context
4 where it should not apply or unreasonably refuses to extend that principle to a new context
5 where it should apply.” *Williams*, 529 U.S. at 407. For a federal court to find a state court’s
6 application of Supreme Court precedent “unreasonable” under § 2254(d)(1), the petitioner
7 must show that the state court’s decision was not merely incorrect or erroneous, but
8 “objectively unreasonable.” *Id.* at 409; *Visciotti*, 537 U.S. at 25.

9 Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state
10 court decision was based on an unreasonable determination of the facts. *Miller-El v. Dretke*,
11 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision “based on a factual
12 determination will not be overturned on factual grounds unless objectively unreasonable in
13 light of the evidence presented in the state-court proceeding.” *Miller-El I*, 537 U.S. at 340;
14 *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In considering a challenge under
15 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner
16 bears the “burden of rebutting this presumption by clear and convincing evidence.” 28
17 U.S.C. § 2254(e)(1); *Miller-El II*, 545 U.S. at 240.

18 DISCUSSION

19 **Claim 4: Ineffective Assistance of Counsel**

20 Petitioner alleges that trial counsel performed ineffectively by calling him as a witness
21 and advising him to testify untruthfully (Claim 4-A); by failing to file a motion to vacate the
22 judgment after two witnesses came forward to support Petitioner’s defense (4-B); and by
23 failing to present expert evidence in mitigation at sentencing (4-C(3)).

24 Clearly established federal law

25 Claims of ineffective assistance of counsel are governed by the principles set forth in
26 *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a petitioner
27 must show that counsel’s representation fell below an objective standard of reasonableness
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1 and that the deficiency prejudiced the defense. *Id.* at 687-88.

2 The inquiry under *Strickland* is highly deferential, and “every effort [must] be made
3 to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s
4 challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.*
5 at 689; *see Wong v. Belmontes*, --- U.S. ----, 130 S. Ct. 383, 384 (2009) (per curiam); *Bobby*
6 *v. Van Hook*, --- U.S. ----, 130 S. Ct. 13, 16 (2009) (per curiam). Thus, to satisfy *Strickland*’s
7 first prong, a defendant must overcome “the presumption that, under the circumstances, the
8 challenged action might be considered sound trial strategy.” *Id.* “The test has nothing to do
9 with what the best lawyers would have done. Nor is the test even what most good lawyers
10 would have done. We ask only whether some reasonable lawyer at the trial could have acted,
11 in the circumstances, as defense counsel acted at trial.” *Id.* at 687-88.

12 With respect to *Strickland*’s second prong, a petitioner must affirmatively prove
13 prejudice by “show[ing] that there is a reasonable probability that, but for counsel’s
14 unprofessional errors, the result of the proceeding would have been different. A reasonable
15 probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*,
16 466 U.S. at 694.

17 Because an ineffective assistance of counsel claim must satisfy both prongs of
18 *Strickland*, the reviewing court “need not determine whether counsel’s performance was
19 deficient before examining the prejudice suffered by the defendant as a result of the alleged
20 deficiencies.” *Id.* at 697 (“if it is easier to dispose of an ineffectiveness claim on the ground
21 of lack of sufficient prejudice . . . that course should be followed”).

22 Under the AEDPA, this Court’s review of the state court’s decision is subject to
23 another level of deference. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002); *see Knowles v.*
24 *Mirzayance*, 129 S. Ct. 1411, 1420 (2009) (noting that a “doubly deferential” standard
25 applies to *Strickland* claims under the AEDPA). Therefore, to prevail on this claim,
26 Petitioner must make the additional showing that the state court, in ruling that counsel was
27 not ineffective, applied *Strickland* in an objectively unreasonable manner. 28 U.S.C. §
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1 2254(d)(1).

2 Claim 4-A

3 Petitioner alleges that counsel performed ineffectively by presenting his testimony and
4 advising him to testify untruthfully regarding the manner in which he killed the victim. (Dkt.
5 82 at 72-76.) Petitioner contends that this element of counsel’s performance prejudiced him
6 at both the guilt and sentencing stages of trial.⁶

7 *Background*

8 At trial and sentencing Petitioner was represented by Jill Thorpe and David Darby,
9 with Darby as lead counsel. (RT 9/9/02 at 12, 17.)⁷ Thorpe was primarily responsible for
10 the sentencing stage of trial. (*Id.* at 12.) A third attorney, Julie Duval, also assisted the
11 defense. (*Id.* at 86-87.)

12 Petitioner raised claims of ineffective assistance of counsel in his PCR petition. The
13 court held an evidentiary hearing. Petitioner’s trial counsel testified, along with a *Strickland*
14 expert. Petitioner also testified.

15 At the hearing, Thorpe testified that prior to his trial testimony Petitioner informed
16 defense counsel that he had struck Johnson with a weighted, lead-lined “sap glove.” (*Id.* at
17 18, 44-46; *see id.* at 90, 128.) Thorpe testified that Petitioner’s story about the sap glove was
18 the “third or fourth version” he had given as to how he killed Johnson. (*Id.* at 16.) Petitioner
19 also provided the information about the sap glove to Dr. Philip Kanof, a toxicologist retained
20 by the defense. (*Id.* at 18-19, 128.) According to Thorpe, Dr. Kanof orally informed her that
21 he was prepared to testify that Petitioner was suffering from methamphetamine-induced

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23 ⁶ Petitioner also alleged in Claim 4-A that counsel performed ineffectively by
24 failing to present expert testimony during the guilt phase of trial. The Court found that this
25 aspect of the claim was procedurally barred. (Dkt. 86 at 17.) In Claim 4-C(3) below, the
26 Court addresses Petitioner’s challenge to counsel’s handling of expert testimony at
27 sentencing.

28 ⁷ “RT” refers to the court reporter’s transcript. “ME” refers to the state court’s
minute entries. Copies of the state court record on appeal, as well as the original trial
transcripts, were provided to this Court by the Arizona Supreme Court. (*See* Dkts. 55, 60.)

1 psychosis at the time of the murder. (*Id.* at 19.)

2 Darby testified that his goal in defending Petitioner was to avoid a first-degree murder
3 conviction. (*Id.* at 70.) He was convinced there was a good chance Petitioner would be
4 convicted of second-degree murder and confident Petitioner would not be sentenced to death.
5 (*Id.* at 53, 65, 70, 11.) Darby also believed Petitioner would be granted a new trial or relief
6 on appeal based on the trial court's failure to provide lesser-included murder instructions.
7 (*Id.* at 20-22.) Darby and Thorpe concluded that evidence showing Petitioner used a weapon
8 to kill the victim would be harmful to the defense because it indicated premeditation. (*Id.*
9 at 48, 53, 71.) It would also provide support for the cruel, heinous, or depraved aggravating
10 factor. (*Id.* at 29.) Finally, in counsel's view, the evidence would potentially jeopardize the
11 defense on retrial. (*Id.* at 21-22.) Because Dr. Kanof was aware that Petitioner had used a
12 weapon to kill the victim, Darby chose not to present his testimony at trial or at sentencing
13 and risk the possible negative consequences resulting from disclosure of the sap glove
14 evidence. (*Id.* at 52-53.) Co-counsel Thorpe agreed with this strategy, and drafted a
15 memorandum documenting their decision, which Petitioner signed after discussing the matter
16 with counsel. (*Id.* at 20-24, 52-53; *see* Petition for Review, 3/17/03, Ex. E.)

17 However, counsel also determined that Petitioner's testimony was necessary to
18 support the defense theory that Petitioner did not act with premeditation, but reacted
19 spontaneously to the victim's homosexual advances. (*Id.* at 33, 60-61, 77.) According to
20 Darby, Petitioner testified willingly. (*Id.* at 75.) Darby advised Petitioner not to volunteer
21 information about the sap glove but to answer truthfully if the question was raised on cross-
22 examination. (*Id.* at 46, 48, 56, 131.)

23 Petitioner's *Strickland* expert, a criminal defense attorney named Bret Huggins,
24 testified that Darby performed at a constitutionally deficient level. (*Id.* at 98.) Huggins
25 stated that he could see no benefit to calling Petitioner as a witness at the guilt phase of trial.
26 (*Id.* at 101-02.) Petitioner's testimony that he struck the victim with his bare hand was
27 discredited by the evidence from the medical examiner; as a result, the jury saw Petitioner
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1 as a liar.⁸ (*Id.* at 101) Huggins conceded, however, that the outcome of the guilt stage of
2 trial would not have changed if Petitioner's testimony had been omitted. (*Id.* at 119.)
3 Huggins also testified that counsel performed ineffectively at sentencing by failing to call Dr.
4 Kanof, whose testimony would have supported the impaired capacity statutory mitigating
5 factor. (*Id.* at 103.)

6 According to Petitioner's testimony at the evidentiary hearing, he was under the
7 impression that he would not testify at trial because counsel had never discussed the issue
8 with him. (*Id.* at 129, 132.) Petitioner stated that the night before he testified Darby and
9 Thorpe met with him for an hour or less. (*Id.* at 130.) They told him he needed to testify in
10 order to avoid a first-degree murder conviction and death sentence. (*Id.*) It was only at this
11 point, according to Petitioner, that Darby asked him about the facts of the murder. (*Id.*)
12 When Petitioner told him about using the sap glove, Darby explained that such information
13 would be damaging and that Petitioner should simply testify that he struck the victim with
14 his hand. (*Id.* at 131.) According to Petitioner, Darby told him that such testimony would
15 be technically true and Petitioner would not be testifying falsely, as long as the prosecutor
16 did not ask him if he had anything on his hand. (*Id.* at 131-32.) Petitioner had confidence
17 in his attorneys and followed their advice. (*Id.* at 132.) When asked at the evidentiary
18 hearing what alternative strategy the defense should have pursued, Petitioner responded: "I
19 could have not testified. I could have gotten on the stand and told a different story. I could
20 have lied in a different fashion. I could have had my attorney try to fight the testimony of
21 the State's witnesses." (*Id.* at 154.)

22 The PCR court rejected Petitioner's claim that counsel performed ineffectively by
23 presenting his testimony. The court, noting that Petitioner's own *Strickland* expert testified
24 that there was no reasonable probability of a different verdict if Petitioner had not testified
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26 ⁸ Huggins also testified that he would not have recommended that Petitioner
27 testify more forthcomingly and reveal that he had used a sap glove to strike the victim. (*Id.*
28 at 101-02.)

1 falsely, found that Petitioner had not been prejudiced by counsel's performance.⁹ (ME
2 1/10/03 at 2.) The court further explained:

3 The basic problem with Defendant's argument is its logic. A defendant
4 who falsely claims to have killed a victim in a rage does not thereby provide
5 a jury with sufficient evidence to convict him of killing with premeditation.
6 Such a conviction must be established, as it was in this case, by evidence other
7 than that of the Defendant's lies. Accordingly, the Court finds that
8 Defendant's false testimony played no role in his convictions.

9 Similarly, his false testimony did not influence the Court's sentencing
10 decisions. . . . The Court arrived at its decision to sentence Petitioner to death
11 based solely on the aggravating and mitigating evidence. Defendant's
12 untruthful testimony neither established aggravation nor rebutted mitigation.
13 Accordingly, the Court finds that Defendant's false testimony played no role
14 in its choice of sentences.

15 . . . Defendant argues that his trial counsel was ineffective for even
16 calling him to testify. . . . As noted above, the Court finds no connection
17 between Defendant's untruthful testimony and his convictions and sentence.
18 He thus fails to prove that he was prejudiced by his decision to testify. In any
19 event, the decision to testify was his, not his counsel's, though the decision
20 was made with counsel's advice.

21 (*Id.* at 3-4.)

22 *Analysis*

23 The PCR court's rejection of this claim was not based on an unreasonable application
24 of *Strickland*. Petitioner's testimony did not prejudice him at the guilt stage of trial. As the
25 state court noted, Petitioner's false version of events did not provide support for a finding of
26 premeditation. Nor was there a reasonable probability of a different verdict if Petitioner had
27 testified truthfully about the weapon used to kill the victim or if he had remained silent and
28 left uncontested the evidence suggesting he acted with premeditation and for pecuniary gain
in attacking the victim and taking his car and wallet. Moreover, without Petitioner's
testimony, the jury would have been left with no information about Petitioner's condition at
the time of the crime, including the fact that he was suffering the effects of withdrawal after

26 ⁹ Because the PCR court's ruling focused on *Strickland*'s prejudice prong, and
27 given the *Strickland* court's instruction to dispose of ineffective assistance claims based on
28 lack of prejudice where it is easier to do so, 466 U.S. at 697, this Court will not make a
determination as to the reasonableness of counsel's strategic decisions.

1 a nearly week-long methamphetamine binge.

2 The cases Petitioner relies on are distinguishable. For example, in *Johnson v.*
3 *Baldwin*, 114 F.3d 835 (9th Cir. 1997), the defendant provided uncorroborated and
4 unconvincing testimony that he was not present at the scene of the crime. The court found
5 that counsel's failure to investigate the defendant's "incredibly lame" alibi and confront him
6 with the "difficulties of his story" constituted ineffective assistance of counsel. *Id.* at 838.
7 If counsel had conducted such an investigation and challenged the defendant with its results,
8 the defendant "probably would not have elected to lie to the jury." *Id.* at 840. Counsel's
9 performance was prejudicial because the State's case against the defendant was "extremely
10 weak" and the jury's "adverse credibility determination . . . probably tipped the scale against
11 him." *Id.* In Petitioner's case, by contrast, there was no failure to investigate; counsel were
12 aware of Petitioner's latest version of the killing. In addition, the case against Petitioner was
13 not weak; he admitted killing the victim, and it was only his testimony that provided any
14 alternative to the State's evidence that the killing was premeditated. *See Carter v. Lee*, 283
15 F.3d 240, 249-53 (4th Cir. 2002) (rejecting ineffective assistance claim based on petitioner's
16 contention that he was "forced" to testify when counsel advised him that his testimony was
17 necessary to support diminished capacity defense, and finding no prejudice where case
18 against petitioner was strong); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 672 (9th
19 Cir. 2002) (advising defendant to testify was not an objectively unreasonable strategic
20 decision and there was no prejudice because evidence against defendant was strong).

21 Another reason the Court cannot find prejudice is because Petitioner has offered
22 alternate versions of what his truthful testimony would have been. According to the
23 memorandum he signed for trial counsel, as well as an affidavit drafted for the PCR
24 proceedings, Petitioner told counsel and Dr. Kanof that when the victim placed his hand on
25 Petitioner's knee, he reached into his "fanny pack," grabbed the sap glove, and struck
26 Johnson repeatedly. (Petition for Review, 3/17/93, Ex. C.) At the PCR evidentiary hearing,
27 however, Petitioner testified that he donned the glove when he stepped outside the vehicle
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1 to use the restroom; he intended to use the glove to threaten Johnson if he refused to drive
2 him back to town. (RT 9/9/02 at 158-60.) Petitioner argues that instead of presenting either
3 version of his truthful testimony, the strategically better alternative would have been not to
4 call Petitioner to testify on his own behalf. Again, this would have left the jury with no
5 explanation for the crime beyond the most damaging version presented through the State's
6 evidence.

7 Claim 4-B

8 Petitioner alleges that counsel performed ineffectively by failing to file a motion to
9 vacate the judgment after two witnesses came forward who supported the defense theory.
10 (Dkt. 82 at 76-78.)

11 During the aggravation/mitigation hearing defense counsel called two witnesses,
12 Eddie Galvaz and Michael Schmitz, to testify about the victim's alleged homosexual
13 tendencies. Galvaz, a former employee of the School of Music who had been terminated due
14 to misconduct and was pursuing legal action against the University, testified that he believed
15 Professor Johnson had "homosexual leanings." (RT 8/22/96 at 8, 15-16, 29.) According to
16 Galvaz, Johnson would pat him on the shoulder or buttocks while Galvaz distributed the
17 mail. (*Id.* at 10.) Galvaz also stated that he and Johnson interacted while using the restroom;
18 Johnson would inquire about Galvaz's social activities, asking about the gay bars Galvaz
19 frequented, and would hug him around the hips while Galvaz used the urinal. (*Id.* at 11.)
20 According to Galvaz, Johnson also made remarks to him about the "cute Mexican boys"
21 Johnson saw around the school, and once commented on a picture he had taken of Galvaz,
22 telling him he "looked good in his nice, tight jeans." (*Id.* at 11-12.) Schmitz testified that
23 Professor Johnson, who was his graduate advisor, offered to give him a pair of old jeans and
24 measured him to see if they wore the same pants length. (*Id.*) Schmitz later told Galvaz that
25 he believed Johnson might be gay. (*Id.*) Long-time colleagues and friends of Professor
26 Johnson testified that he was a "decent family man"; they had never observed or heard
27 reports of any inappropriate behavior on his part or any indications that he was gay. (*Id.* at
28

30, 34.)

The PCR court rejected the claim that trial counsel performed ineffectively by failing to move to vacate the judgment based on this information. (ME 1/10/05 at 4-5.) The court explained:

A motion to vacate judgment under Rule 24.2(a)(2), on the grounds of newly discovered evidence, is evaluated under the standards of Rule 32.1. Assuming that this evidence could have been properly submitted under a motion to vacate judgment, the main question is whether its admission “probably would have changed” the outcome of defendant’s trial. Rule 32.1(e). A motion to vacate judgment and grant a new trial is properly denied if the testimony of the proffered witness does not appear reliable or credible to the trial court.

Here, the Court listened to Galvaz and Schmitz at the sentencing hearing, yet concluded in its special verdict that “it is unreasonable and flies in the face of logic to believe that this murder was motivated by rage [T]he only motivation proved beyond a reasonable doubt is that [the victim’s] murder was for pecuniary gain.” Further, the Court found that “[t]he clear implication of the evidence is that [D]efendant formed the intent to profit from the murder no later than when he picked up the object he used to bludgeon [the victim]. The evidence is not reasonably susceptible to any other interpretation.” Because the Court reached these conclusions after having listened to Galvaz and Schmitz, it is clear that the Court did not find their testimony sufficient to contradict the conclusion that Defendant’s motivation was pecuniary gain. The Court finds that the introduction of this evidence at trial would not have changed the verdicts. Accordingly, counsel did not fall below reasonable professional standards by not submitting this testimony in a motion to vacate judgment.

(*Id.* (citation omitted).)

The PCR court did not unreasonably apply *Strickland* in rejecting this claim. Petitioner was not prejudiced by counsel’s failure to file a motion to vacate because there was no reasonable probability that the trial judge would have granted the motion. At best, the testimony of Galvaz and Schmitz, if viewed as credible, suggested that Professor Johnson was gay. It offers no support for Petitioner’s defense that he killed Johnson spontaneously in reaction to the victim’s sexual overtures. As the trial and PCR courts observed, Petitioner’s version of events was belied by the evidence of how the attack occurred. The state courts considered the new information from Galvaz and Schmitz and correctly determined that it had no bearing on the evidence showing that Petitioner did not “freak out” during a homosexual encounter, but committed the murder in order to gain access to the

1 victim's property.

2 Claim 4-C(3)

3 Petitioner asserts that sentencing counsel performed ineffectively by failing to present
4 testimony from a toxicologist concerning Petitioner's impaired mental capacity due to
5 methamphetamine use and withdrawal at the time of the crime. (Dkt. 82 at 87-89.)
6 According to Petitioner, the omitted evidence would have supported a finding, pursuant to
7 A.R.S. § 13-703(G)(1), that his capacity to appreciate the wrongfulness of his conduct or
8 conform his conduct to the law was significantly impaired. (*Id.* at 88-89.)

9 *Background*

10 At trial, Petitioner testified that he used methamphetamine regularly from 1991 to the
11 time of the murder. (*Id.* at 23.) He "[l]ived to get the drug." (*Id.*) He used
12 methamphetamine continuously in the days before the murder, with his last usage occurring
13 on the morning of the murder. (RT 3/13/96 at 23-61.) During this period Petitioner slept and
14 ate very little. (*Id.* at 23-61.)

15 Petitioner described the effects of withdrawal from methamphetamine, testifying that
16 users get "violent" and "crazy" when coming off the drug. (*Id.* at 49.) Petitioner testified
17 that he was "jonesing," or experiencing cravings for methamphetamine, when he encountered
18 the victim on the night of the 28th. (*Id.* at 89.) His goals at that point were to obtain drugs
19 and win back his estranged girlfriend. (*Id.* at 162.)

20 Following Petitioner's conviction, the trial court held an aggravation/mitigation
21 hearing. Defense counsel presented testimony from Petitioner's parents, ex-wife, step-
22 brother, and step-mother. Their testimony demonstrated that Petitioner's family life was
23 unstable and dysfunctional. His parents separated when he was 12 or 13. (RT 7/29/96 at 26,
24 45.) After the separation, Petitioner lived primarily with his father, a trapper, who migrated
25 between Arizona and Washington state. (*Id.* at 21-24, 45-46.) Petitioner's mother began to
26 lead a "wild" life style, setting a bad example by exposing Petitioner to drugs, including
27 methamphetamine; she testified that her behavior contributed to Petitioner's criminal
28

1 conduct. (*Id.* at 47-48.) The witnesses testified about Petitioner's drug problem and its
2 negative effect on his behavior and his family relationships. (*Id.* at 31-32; 48-49; 63-64.)
3 They also offered humanizing testimony describing Petitioner's positive character traits,
4 including his intelligence, his talent as a motorcycle mechanic, his love for his children, and
5 the absence of any prior violent behavior. (*Id.* at 27-29, 58-60, 73-74.) In addition to this
6 testimony, counsel submitted letters from Petitioner's family and a social history composed
7 by Petitioner and counsel. (*Id.* at 84-85.)

8 In sentencing Petitioner to death, the trial court found that the State had proved two
9 aggravating factors, that the murder was committed for pecuniary gain and was especially
10 heinous or depraved. (RT 8/26/96 at 4-5, 8.) The court found that Petitioner failed to prove
11 any statutory mitigating factors, but that his drug use and withdrawal and his lack of a felony
12 record constituted nonstatutory mitigation. (*Id.* at 10.)

13 The Arizona Supreme Court, in its independent review of the death sentence, struck
14 the heinous or depraved aggravating factor. *Greene*, 192 Ariz. at 441, 967 P.2d at 116. The
15 court then reweighed the aggravating and mitigating circumstances and affirmed the
16 sentence. In doing so, the court addressed the (G)(1) mitigating factor as follows:

17 Greene argues that the trial court erred by failing to find that due to his drug
18 use, his "capacity to appreciate the wrongfulness of his conduct or to conform
his conduct to the requirements of law was significantly impaired."

19 Greene testified that at the time of the murder he was withdrawing from
20 drugs. Other than his own statement, Greene presented no evidence of the
21 effect the withdrawal had on his capacity to appreciate the wrongfulness of his
conduct or his ability to conform his conduct to the requirements of the law at
the time of the offense.

22 To the contrary, Greene's behavior shows that he did appreciate the
23 wrongfulness of his conduct. After the murder, Greene asked Bevan for clean
24 pants and shoes. Because Bevan did not have pants for him, Greene rubbed
25 dirt on the bloodstains, "trying to be as inconspicuous as possible." Greene
26 also took a small rug to cover the bloody car seats. In addition, he feigned
27 injury to his hand in order to use Johnson's stolen credit cards. We agree with
28 the trial court that the evidence is insufficient to establish the existence of the
(G)(1) mitigating circumstance. Furthermore, we agree that Greene failed to
establish any of the mitigating factors in A.R.S. § 13-703(G). Greene's drug
use on the days before the murder is undisputed. From Friday, February 24,
1995, until Tuesday, February 28, 1995 (the date of the murder), Greene used
methamphetamine every day. During this time he ate very little and did not

1 sleep. . . . Greene testified that he was not under the influence of drugs at the
2 time he killed. Nor was there expert testimony of any causal connection
3 between drug use or withdrawal and the offense. While it is true that Greene
4 killed to get money to buy drugs, this is not the sort of causal connection that
would support a claim of mitigation. To hold that a motivation to kill fueled
in part by a desire for drugs is mitigating would be anomalous indeed. We
reject this claimed mitigating circumstance.

5 *Greene*, 192 Ariz. at 441-42, 967 P.2d at 116-17 (citations omitted).

6 As described above, at the evidentiary hearing before the PCR court, Thorpe and
7 Darby testified that they decided not to present Dr. Kanof's testimony about
8 methamphetamine psychosis, fearing that the sap glove evidence would support the cruel,
9 heinous, or depraved aggravating factor and would harm Petitioner's defense if he were
10 granted a new trial. Petitioner signed a memorandum endorsing that decision. Having
11 decided not to call Dr. Kanof, counsel had Petitioner examined by another mental health
12 expert, Dr. Kathryn Boyer. (RT 9/9/02 at 27, 37.) Dr. Boyer determined that Petitioner had
13 an above average IQ and diagnosed him with antisocial personality disorder; neither finding
14 would have benefitted Petitioner as a mitigating circumstance. (*Id.*)

15 The PCR court rejected Petitioner's claim that counsel's failure to present Dr. Kanof's
16 testimony at sentencing constituted ineffective assistance. Addressing the prejudice prong
17 of the *Strickland* test, the court explained:

18 Defendant next argues that he received ineffective assistance of counsel at
19 sentencing. He complains that counsel should have called Dr. Kanof, a
20 toxicologist, who would have testified that Defendant suffered from a
21 disassociative state due to methamphetamine-induced psychosis at the time of
22 the murder. The toxicologist did not testify, however, because Defendant did
23 not want it revealed that he had told the toxicologist that he had used the "sap"
glove to kill the victim. As a result, no such evidence of the disassociative
state was presented at sentencing. Such evidence, Defendant maintains, would
have established a causal connection between his drug use or withdrawal and
the murder, which would have persuaded the Court to find the existence of the
mitigating factor set forth in A.R.S. § 13-703(G)(1).

24

25 The argument is purely speculative. There is nothing in the record to
26 suggest what Dr. Kanof would have told the Court, had he been called. There
27 is no evidence that Dr. Kanof performed tests or prepared a report.
28 Defendant's counsel remember having been informed orally of the diagnosis
and concluding therefrom that it was sufficient to establish the (G)(1) factor.
Defendant did not attach to this petition the doctor's affidavit that could have

1 established the factual grounds of the alleged diagnosis. See Rule 32.5. The
2 only evidence that Dr. Kanof diagnosed the Defendant at all is hearsay elicited
at the evidentiary hearing.

3 But, even assuming such a diagnosis was made, it does not establish
4 even a rebuttal causal connection between his drug use or withdrawal and the
murder. All evidence, in fact, suggests the opposite. Defendant “killed to get
5 money to buy drugs,” as shown by his actions after the murder and his own
testimony. 192 Ariz. at 441, 967 P.2d at 116. Defendant testified that the two
6 most important things in his life at the time were to get more drugs and to win
back his girlfriend. *Id.* at 439, 967 P.2d at 114. Moreover, “[o]n cross-
7 examination, he stated unequivocally that neither usage nor withdrawal from
methamphetamine had ever affected his memory.” *Id.* At the evidentiary
8 hearing, Defendant testified that he put on the “sap” glove, not in response to
the victim’s alleged homosexual advances, but “[a]s a threat in case [he]
9 needed to use it” to persuade the victim to drive him back to town. Further,
there is no evidence that Defendant’s heavy drug use or withdrawal, which
10 started more than 10 years before the murder, had ever caused him to act
violently. His only prior conviction was for misdemeanor theft. On this
11 record, the Court finds that counsel did not fall below professional standards
by not calling Dr. Kanof.

12 (ME 1/10/03 at 5-6.)

13 *Analysis*

14 The right to effective assistance of counsel applies not just to the guilt phase but “with
15 equal force at the penalty phase of a bifurcated capital trial.” *Silva v. Woodford*, 279 F.3d
16 825, 836 (9th Cir. 2002) (quoting *Clabourne v. Lewis*, 64 F.3d, 1373, 1378 (9th Cir. 1995)).
17 In assessing whether counsel’s performance was deficient under *Strickland*, the test is
18 whether counsel’s actions were objectively reasonable at the time of the decision. *Strickland*,
19 466 U.S. at 689-90. The question is “not whether another lawyer, with the benefit of
20 hindsight, would have acted differently, but ‘whether counsel made errors so serious that
21 counsel was not functioning as the counsel guaranteed the defendant by the Sixth
22 Amendment.’” *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998) (quoting
23 *Strickland*, 466 U.S. at 687).

24 With respect to prejudice at sentencing, the *Strickland* Court explained that “[w]hen
25 a defendant challenges a death sentence . . . the question is whether there is a reasonable
26 probability that, absent the errors, the sentencer . . . would have concluded that the balance
27 of aggravating and mitigating circumstances did not warrant death.” 466 U.S. at 695. In
28

1 *Wiggins v. Smith*, 539 U.S. 510, 534 (2003), the Court noted that “[i]n assessing prejudice,
2 we reweigh the evidence in aggravation against the totality of available mitigating evidence.”
3 The totality of the available evidence includes “both that adduced at trial, and the evidence
4 adduced in the habeas proceeding.” *Id.* at 536 (quoting *Williams v. Taylor*, 529 U.S. at 397-
5 98). Recently, the Court reiterated that “*Strickland* places the burden on the defendant, not
6 the State, to show a ‘reasonable probability’ that the result would have been different.”
7 *Belmontes*, --- U.S. ----, 130 S. Ct. at 390-91.

8 The PCR court reasonably applied *Strickland* in rejecting this challenge to counsel’s
9 performance at sentencing, rightly noting that the claim relies on speculation. There was no
10 basis for the PCR court to find that Petitioner met his burden of proving he was prejudiced
11 by counsel’s failure to present Dr. Kanof’s testimony at sentencing. Without a report or
12 affidavit from Dr. Kanof, there is no way to know whether he could have offered medical or
13 psychological support for his theory of methamphetamine-induced psychosis, what such
14 psychosis entailed, or how it would have affected Petitioner’s conduct at the time of the
15 crimes. Absent such evidence, Petitioner cannot meet his burden of affirmatively proving
16 prejudice.

17 Other factors militate against a finding that Petitioner was prejudiced by counsel’s
18 failure to present Dr. Kanof’s testimony. First, trial counsel did present significant evidence
19 through Petitioner’s own testimony that he was a methamphetamine addict who was suffering
20 severe withdrawal symptoms and whose primary goal at the time of the murder was to
21 acquire funds with which to obtain drugs. Moreover, in reviewing Petitioner’s death
22 sentence, the Arizona Supreme Court held that the desire to obtain drugs did not constitute
23 a mitigating factor under § 13-703(G)(1). This ruling limits the effect of Dr. Kanof’s
24 proposed testimony, which could only have supported a finding of nonstatutory mitigation.
25 As already noted, the sentencing court did determine that Petitioner’s drug use and
26 withdrawal constituted a nonstatutory mitigating circumstance, so additional testimony on
27 the issue would have had little impact on the state courts’ sentencing considerations. Given
28

1 these circumstances, Petitioner cannot sustain a claim of ineffective assistance of counsel
2 based on the omission of Dr. Kanof's testimony.

3 In *Raley v. Ylst*, 470 F.3d 792, 801-03 (9th Cir. 2006), trial counsel retained three
4 separate mental health experts to interview the defendant, provide a report, and possibly
5 testify at trial. The reports provided by the experts, however, were at best equivocal and in
6 some instances harmful to the defendant's case; they included findings that he was "callous,"
7 "dangerous," and a "sexual psychopath." *Id.* Trial counsel decided not to call the experts
8 at trial. *Id.* On habeas review, the Ninth Circuit concluded that this was a reasonable
9 strategic decision made after reasonable investigation and did not constitute ineffective
10 assistance of counsel. *Id.* The court also found that the defendant was not prejudiced given
11 the double-edged nature of the experts' findings and the fact that the link between the
12 defendant's abusive childhood and his later crimes was not "so esoteric" as to require
13 explanation by an expert. *Id.* at 802-03. See *Nields v. Bradshaw*, 482 F.3d 442, 455-56 (6th
14 Cir. 2007) (rejecting ineffective assistance claim based on counsel's failure to retain an
15 expert to testify about the causal relationship between the defendant's alcoholism and his
16 behavior on the night of the murder). In Petitioner's case, counsel decided not to call Dr.
17 Kanof in order to avoid disclosure of evidence that counsel believed would damage
18 Petitioner's case at sentencing and in any future proceedings. Nonetheless, the sentencing
19 judge was provided a detailed account, through Petitioner's trial testimony and the testimony
20 of family members during the aggravation/mitigation hearing, of Petitioner's history of drug
21 abuse, its effects on his behavior, and his condition at the time of the murder. The negative
22 effects of drug abuse and withdrawal are not so esoteric as to elude a lay person's
23 understanding, as demonstrated by the sentencing judge's determination that Petitioner's
24 drug use constituted a nonstatutory mitigating circumstance.

25 Finally, as the Arizona Supreme Court and PCR court noted, the evidence at trial did
26 not support a finding that Petitioner's capacity to appreciate the wrongfulness of his conduct
27 or conform his conduct to the law was significantly impaired as required by the (G)(1)
28

1 mitigating factor. To the contrary, the evidence showed that Petitioner committed the crime
2 with the goal of obtaining funds; that he took numerous steps to conceal his actions and
3 evade capture; and that after the killing, employing a ruse to explain the discrepancy in his
4 and the victim's signatures, he used Johnson's credit cards to purchase items that could be
5 sold for cash to purchase drugs or utilized in his attempt to flee the area. Also, as revealed
6 in his trial testimony, Petitioner's memory of the events surrounding the murder was vivid
7 and complete, further belying the contention that he was significantly impaired by drug use
8 or withdrawal.

9 Conclusion

10 The PCR court's rejection of Petitioner's ineffective assistance of counsel claims did
11 not constitute an unreasonable application of clearly established federal law. Applying the
12 doubly deferential level of review mandated by *Strickland* and the AEDPA, the Courts finds
13 that Claims 4-A, 4-B, and 4-C(3) are without merit.

14 **Claim 6-B: Pecuniary Gain Aggravating Factor**

15 Petitioner alleges that there was insufficient evidence to support the state courts'
16 findings regarding the pecuniary gain aggravating. (Dkt. 82 at 108-16.)

17 The trial court determined that the State had proved beyond a reasonable doubt that
18 Petitioner committed the murder in the expectation of pecuniary gain under A.R.S. § 13-
19 703(F)(5). (RT 8/26/96 at 5.) In support of its ruling the court made the following findings:

20 Resolution of this issue balances the testimony of [medical examiner]
21 Dr. Sibley that the type and amount of damage to [the] victim could not have
22 been caused by Beau John Greene's bare hand. In order to cause such damage,
the defendant had to have used an implement such as a rock or club.

23 The defendant's defense, and his most recent version of events,
24 maintained he hit Roy Johnson with Greene's bare hand in a moment of
25 sudden rage. Dr. Sibley's testimony destroys the truth of the defendant's story
26 because Beau John Greene had to have made a conscious effort to use an
27 instrument for the purposes of beating the victim in order to cause the injuries
28 suffered by Roy Johnson. It is impossible to believe the defendant's version
of events in view of the existing uncontroverted medical evidence. Without
a doubt, as the jury found, the defendant premeditated the murder of Roy
Johnson. In view of this evidence, it is unreasonable and flies in the face of
logic to believe that this murder was motivated by rage. In view of these facts,
the only motivation proved beyond a reasonable doubt is that Roy Johnson's

1 murder was for pecuniary gain.

2 Nor does the physical evidence support the defendant's story that he
3 formed the intent to take the victim's wallet and automobile only after Beau
4 John Greene had killed Roy Johnson. With regard to the theft of the wallet,
5 this portion of the defendant's story might have been corroborated by a second
6 set of footprints leading to the body, but the evidence shows just one set of
7 prints. For this reason the Court concludes that the defendant lied about both
8 hitting Roy Johnson with his bare hand and about returning to the wash to get
9 the wallet.

10 The clear implication of the murder is that the defendant formed the
11 intent to profit from the murder no later than the moment when he picked up
12 the object he used to bludgeon Roy Johnson. This evidence is not reasonably
13 susceptible to any other interpretation.

14 (*Id.* at 4-5.)

15 On direct appeal, the Arizona Supreme Court likewise rejected Petitioner's challenge
16 to the pecuniary gain aggravating factor:

17 The trial court found that the medical testimony and the crime scene
18 evidence completely negated Greene's version of the killing. According to the
19 medical examiner, Greene could not have fractured Johnson's skull with his
20 fists. Further, the medical examiner testified that a heavy flat object was used
21 to kill Johnson. The use of an instrument implies premeditation. It also
22 undermines Greene's account, and, therefore, his credibility. Likewise,
23 evidence at the crime scene reveals the falsity of Greene's proffered
24 motivation for the killing. The single set of tire tracks and footprints near the
25 wash indicates that Greene did not return for Johnson's wallet as he claims, but
26 instead had the wallet with him when he left the wash immediately following
27 the murder.

28 The trial court's finding that Greene intended to profit from the murder
was also supported by Greene's admitted need for money, drugs, and
transportation. Greene testified that he was hungry, tired, and craving
methamphetamine when he encountered Johnson. He was homeless, had no
transportation, and was attempting to avoid a drug dealer who had threatened
to shoot him over an outstanding debt. Greene testified that the two most
important things in his life at the time were to get more drugs and to win back
his girlfriend.

Greene's actions after the murder also demonstrate a pecuniary motive.
Driving Johnson's car, and within hours of the murder, Greene began using
Johnson's credit cards. Greene wrapped his hand in K-Y jelly and gauze and
feigned injury to explain any discrepancy in credit card signatures. With the
stolen credit cards, he purchased camping equipment, food, and electronic
equipment that he later traded for drugs. He also bought food and took it to his
girlfriend's house for her son.

Greene argues the court failed to properly consider the effect of his
methamphetamine use on his ability to accurately perceive and recall the
events that night. But if Greene's memory is suspect, all that remains is

1 uncontradicted evidence offered by the state. Moreover, during trial, Greene
2 recalled, in great detail, events both before and after the murder. On cross
3 examination, he stated unequivocally that neither usage nor withdrawal from
methamphetamine had ever affected his memory.

4 We have held that when one comes to rob, the accused expects
pecuniary gain and this desire infects all other conduct. *See State v.*
5 *Landrigan*, 176 Ariz. 1, 6, 859 P.2d 111, 116 (1993). The evidence supports
beyond a reasonable doubt a finding that Greene, coming off of
6 methamphetamine and penniless, killed Johnson to obtain cash or credit cards
so that he could make fraudulent purchases to exchange for money or drugs.
7 Thus, the trial court found that Greene's admitted need for money, drugs, and
transportation in combination with the crime scene evidence showed that
8 Greene intended to profit from the murder no later than the moment he picked
up the object to kill Johnson. We agree. Greene murdered Johnson for
9 pecuniary gain.

10 *Greene*, 192 Ariz. at 438-39, 967 P.2d at 113-14.

11 Analysis

12 With respect to a state court's application of an aggravating factor, habeas review "is
13 limited, at most, to determining whether the state court's finding was so arbitrary and
capricious as to constitute an independent due process or Eighth Amendment violation."
14 *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). In making that determination, the reviewing
15 court must inquire "whether, after viewing the evidence in the light most favorable to the
16 prosecution, any rational trier of fact could have found that the factor had been satisfied."
17 *Id.* at 781 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard "gives full
18 play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to
19 weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."
20 *Jackson*, 443 U.S. at 319.

21 "[A] finding that a murder was motivated by pecuniary gain for purposes of § 13-
22 703(F)(5) must be supported by evidence that the pecuniary gain was the impetus of the
23 murder, not merely the result of the murder." *Moormann v. Schriro*, 426 F.3d 1044, 1054
24 (9th Cir. 2005). A rational factfinder could have determined that Petitioner killed Johnson
25 in order to obtain money and transportation, not because he was disturbed by the victim's
26 homosexual advances. The evidence showed that prior to the murder Petitioner was broke,
27 tired, hungry, desperate for drugs, and determined to regain the affections of his estranged
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1 girlfriend. To commit the murder he armed himself with an object capable of crushing
2 Johnson's skull. Immediately after the murder he took the victim's car and wallet, concocted
3 the ruse that his hand was injured, and went on a spending spree. The only reasonable
4 inference to be drawn from this evidence, none of which was in serious dispute, was that
5 Petitioner was motivated by pecuniary gain to kill Johnson. Therefore, Petitioner is not
6 entitled to relief on Claim 6-B.

7 **CERTIFICATE OF APPEALABILITY**

8 Pursuant to Rule 11 of the Rules Governing § 2254 Cases, the Court has evaluated the
9 claims within the petition for suitability for the issuance of a certificate of appealability
10 (COA). *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

11 Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an appeal
12 is taken by a petitioner, the district judge who rendered the judgment "shall" either issue a
13 COA or state the reasons why such a certificate should not issue. Pursuant to 28 U.S.C. §
14 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of
15 the denial of a constitutional right." This showing can be established by demonstrating that
16 "reasonable jurists could debate whether (or, for that matter, agree that) the petition should
17 have been resolved in a different manner" or that the issues were "adequate to deserve
18 encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing
19 *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will
20 issue only if reasonable jurists could debate whether the petition states a valid claim of the
21 denial of a constitutional right and whether the court's procedural ruling was correct. *Id.*

22 The Court finds that reasonable jurists could debate its resolution of Claims 4-A and
23 4-C(3). For the reasons stated in this order, and in the order of October 6, 2006 (Dkt. 86),
24 the Court declines to issue a COA with respect to any other claims.

25 Based on the foregoing,

26 **IT IS ORDERED** that Petitioner's Amended Petition for Writ of Habeas Corpus
27 (Dkt. 82) is **DENIED**. The Clerk of Court shall enter judgment accordingly.
28

1 **IT IS FURTHER ORDERED** that the stay of execution entered by this Court on
2 December 9, 2003 (Dkt. 2), is **VACATED**.


3 **IT IS FURTHER ORDERED GRANTING** a Certificate of Appealability as to the
4 following issues:

5 Whether Claim 4-A, alleging that counsel performed ineffectively by
6 presenting his testimony and advising him to testify untruthfully, is without
merit.

7 Whether Claim 4-C(3), alleging ineffective assistance of counsel at sentencing
8 based on counsel's failure to present expert testimony from a toxicologist, is
without merit.

9 **IT IS FURTHER ORDERED** that the Clerk of Court forward a courtesy copy of
10 this Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ
11 85007-3329.

12 DATED this 31st day of March, 2010.

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17 FRANK R. ZAPATA
18 United States District Judge
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